Supreme Court, U.S.
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No. 03-187

IN THE

Supreme Court of the United States

AURORA NATIONAL LIFE ASSURANCE COMPANY and NEW CALIFORNIA LIFE HOLDINGS, INC.,

Petitioners,

v.

SIERRA NATIONAL INSURANCE HOLDINGS, INC. and GEORGIA LEE, as Receiver for SIERRA NATIONAL INSURANCE HOLDINGS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Sierra National Insurance Holdings, Inc. has no parent corporation and is privately held. No publicly held company owns 10% or more of its stock.

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Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 10, 11, 19

Respondents Sierra National Insurance Holdings, Inc. and Georgia Lee, as Receiver for Sierra National Insurance Holdings, Inc. (collectively, "Sierra"), respectfully request that the Court deny the Petition for Writ of Certiorari ("Petition" or "Pet.") filed by Petitioners Aurora National Life Assurance Company and New California Life Holdings, Inc. (collectively, "Aurora") regarding a footnote in an unpublished decision on Aurora's interlocutory appeal.[1]

STATEMENT OF THE CASE

A. Sierra's Claim For Tortious Interference With Its Business Expectancy.

Sierra was the alternate winner of an auction held by California Insurance Commissioner John Garamendi ("the Commissioner") for the rehabilitation of Executive Life Insurance Company ("ELIC"). But for a massive fraud perpetrated by Aurora and the other defendants, at least two of whom were recently indicted on federal criminal charges arising from that fraud, Sierra would have prevailed at the auction and today would own ELIC. C.A. App. 233 ¶ 6.[2]

1. Aurora misspeaks when it refers to the decision below as an "opinion" (Pet. 1, 2); the decision below is designated as a "Memorandum." In the Ninth Circuit, all "opinions" are published; all "memoranda," like the one below, are unpublished and "are not binding precedent." *See* Ninth Circuit Rules 36-1 & 36-3(a).

2. "C.A. App." refers to the Excerpts of Record filed in the Ninth Circuit. Since Aurora's interlocutory appeal challenged the denial of its Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, the only relevant facts are those contained in Sierra's First Amended Complaint ("Complaint"). *See* C.A. App. 232-266. Aurora's Statement of the Case relies on numerous documents produced in discovery, all of which should be disregarded by this Court.

The auction for ELIC, which was announced shortly after the Commissioner seized control of ELIC in April 1991, generated a total of eight bids, including Sierra's. C.A. App. 237-38 ¶¶ 36-41 & 240 ¶ 45. The Commissioner promptly rejected all but three bidders: Sierra, a French syndicate that included the defendants in this case,[3] and an entity known by its acronym, NOLHGA. C.A. App. 240 ¶ 47.

Initially, the Commissioner conditionally accepted NOLHGA's bid. C.A. App. 240 ¶ 47. His "Selection of Bidder," and the confirming order of the Rehabilitation Court, both provided, however, that if NOLHGA failed to satisfy a list of conditions by a date certain, then he "was obligated" to sell ELIC either to Sierra or to defendants. *Id.*

In November 1991, the Commissioner rejected NOLHGA's bid for failure to meet his conditions. He invited Sierra and defendants to submit renewed bids, reaffirming that he would select either one or the other, and so stipulated to the Rehabilitation Court. C.A. App. 240-41 ¶ 48. As the California Court of Appeal determined in reviewing challenges to the Commissioner's plan for the rehabilitation of ELIC, the Commissioner "narrowed the bidders to [defendants] and Sierra." *In re Executive Life Ins. Co.*, 32 Cal. App. 4th 344, 363 (1995).[4]

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3. The members of the French syndicate who are defendants in Sierra's action are Credit Lyonnais S.A., Altus Finance S.A., CDR Enterprises, MAAF Assurances, MAAF Vie S.A., Omnium Geneve S.A., Consortium de Realisation S.A., Jean-Francois Henin, and Jean Irigoin. Aurora conspired with the French syndicate and was the vehicle for the syndicate's illegal acquisition of ELIC.

4. By referring to Sierra as nothing more than "a disappointed bidder" and "[o]ne of the eight bidders," Aurora's Statement of the Case misstates the status of Sierra's bid. *See* Pet. 2-3. Sierra has alleged and will prove at trial that it was the alternate winner for ELIC.

Unknown to everyone but defendants, defendants' bid was illegal. They had entered into secret agreements, known as *contrats de portage*, under which control of ELIC passed to defendant Credit Lyonnais, a bank owned by the French government. C.A. App. 241-42 ¶¶ 51-55. Their acquisition therefore violated Section 699.5 of the California Insurance Code prohibiting agencies of foreign governments from acquiring ownership or control of a California insurer. C.A. App. 241, 246 ¶¶ 51, 82. It also violated the federal Bank Holding Company Act, 12 U.S.C. § 1841, *et seq.*, which severely restricted any control of insurers by banks. C.A. App. 241 ¶ 51.

Defendants knew their actions were illegal. Indeed, to conceal what they had done, they falsely denied the existence of the illegal *portage* agreements in statement after statement to the Commissioner, the Rehabilitation Court, the Federal Reserve, Sierra and others. C.A. App. 244-54 ¶ 71-111. As one of their own lawyers has admitted: "[They] lied to this [Rehabilitation] Court, lied to their advisors, lied to everyone." Supp. C.A. App. 1474 n.2.[5]

Unaware of the illegality of defendants' bid, the Commissioner selected it. C.A. App. 241 ¶ 49. Had he known the truth, he would not — indeed could not — have done so, but would instead have sold ELIC to Sierra as he committed to do. C.A. App. 240-41 ¶ 48. From that acquisition Sierra would have realized profits at least as great as the $2 billion defendants garnered. C.A. App. 241 ¶ 50. Even after the Commissioner had selected defendants' bid, Sierra's bid remained a standby bid; Sierra was ready, willing and able to perform its obligations under its bid. C.A. App. 241 ¶ 49. Sierra's owners and directors had experience and national reputations for managing insurance

5. Supp. C.A. App. refers to the Supplemental Excerpts of Record filed in the Ninth Circuit.

companies and high yield bond portfolios. C.A. App. 239 ¶ 42-43. They spent millions of dollars for actuaries, accountants, attorneys and other professionals in support of Sierra's bid, and incurred large expenses for the work of the directors, senior officers and other employees. *Id.*

Defendants' criminal activity might never have come to light had not a French whistleblower revealed the existence of the illegal *portage* agreements in late 1998. The Commissioner then sued defendants for the fraud practiced upon him. C.A. App. 255 ¶ 113. Sierra subsequently sued defendants for the independent injury to Sierra caused by defendants' intentional and illegal interference with Sierra's reasonable expectation of acquiring ELIC. C.A. App. 232-266.

B. The District Court Denies Aurora's Motion To Dismiss Sierra's Complaint For Lack of Standing.

Aurora twice moved to dismiss Sierra's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, resulting in the two District Court opinions appended to Aurora's Petition. *See* Appendix to Aurora's Petition for Writ of Certiorari ("Pet. App.") 5a-57a. The District Court held that Sierra had standing to proceed with its claims under California law for intentional interference with prospective economic advantage. Pet. App. 40a-47a.

The District Court first recognized that Aurora's challenge to Sierra's standing was predicated on the introduction of evidence purporting to contradict the allegations in Sierra's Complaint. Pet. App. 40a ("Although this motion ostensibly challenges the sufficiency of a complaint, defendants have proffered a detailed history, supposedly supported by numerous exhibits, to establish a foundation for their arguments challenging

Sierra's standing to sue."). The District Court refused to take judicial notice of any of Aurora's proffered evidence, explaining that "too many facts and inferences are disputed. The issues require full briefings, such as on motions for summary judgment." Pet. App. 41a.

Thus, the District Court accepted Sierra's allegations as true and addressed the merits of Aurora's standing argument. Pet. App. 41a-47a. The District Court held that none of Aurora's legal authorities deprived Sierra of standing to proceed with its intentional interference claims, explaining that Aurora had no authority "for the proposition that under no set of facts could a second-place bidder ever establish by a preponderance of the evidence that it would have received the contract." Pet. App. 44a. The Court adopted the reasoning of *Iconco v. Jensen Const. Co.*, 622 F.2d 1291, 1300 (8th Cir. 1980): a bidder in Sierra's shoes should be put "to its proof" because "if it proves by a preponderance of the evidence that it would have received the contract award absent the successful bidder's wrongdoing, we find no persuasive reasons why recovery should be denied." Pet. App. 43a-45a. In *Iconco*, the Eighth Circuit affirmed a jury verdict for a second place bidder against the winning bidder where the winning bidder prevailed by defrauding the agency awarding the contract. 622 F.2d at 1300-01. The District Court accordingly held that, like the plaintiff in *Iconco*, Sierra had standing to attempt to prove its allegations by a preponderance of the evidence. Pet. App. 45a.

C. Aurora's Interlocutory Appeal.

Aurora declined to accept the District Court's invitation to prepare "full briefings" or "motions for summary judgment" on the standing issue. It has had every opportunity to do so because discovery and motion practice has continued unabated since the

District Court determined that Sierra had adequately alleged standing in June 2001. In the more than two years of litigation since that decision dozens of depositions have been taken, written discovery and document productions have continued, and the District Court has resolved many pre-trial motions. Two of Sierra's principals are scheduled to be deposed by Aurora and the other defendants by the end of October 2003. Most recently, published news reports have established that at least two defendants — Credit Lyonnais S.A. and Consortium de Realisation S.A. — have been indicted on federal criminal charges for their illegal actions in connection with ELIC. That sealed indictment has resulted in an agreement by those defendants to plead guilty to one or more charges and to pay more than $450 million in fines and restitution, one of the largest financial penalties in U.S. history.

While continuing its active litigation in the District Court, Aurora filed an interlocutory appeal with the Ninth Circuit. Aurora's appeal focused not on Sierra's standing, but rather on Aurora's claim that its numerous falsehoods were protected under California's litigation privilege. Indeed, the sole basis for interlocutory review was the privilege issue, not Sierra's standing. The denial of a motion to dismiss for lack of standing is not subject to interlocutory review. *See Catlin v. United States*, 324 U.S. 229, 236 (1945) ("[D]enial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable."); *Carringer v. Tessemer*, 253 F.3d 1322, 1323 (11th Cir. 2001) ("[T]he question of standing does not fit within the collateral order doctrine . . . .").

Aurora apparently did little research on the standing issue, as it did not cite the cases on which it relies most heavily in its Petition — *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Steel Co. v. Citizens for*

a Better Env't, 523 U.S. 83 (1998), and *Merritt v. Shuttle, Inc.*, 187 F.3d 263 (2d Cir. 1999) — in any of its briefs in the Ninth Circuit. Aurora first cited *Vermont Agency* six days before oral argument in a letter stating that it had just learned of the then two-year old decision. Aurora first cited *Merritt* at oral argument, stating that its counsel had "discovered" the case the weekend before oral argument even though it had been decided almost four years earlier. Aurora never cited *Steel Co.* until it filed its Petition for Rehearing.

Perhaps due to Aurora's belated citation to these authorities, the Ninth Circuit's memorandum addressed Aurora's standing argument only in a footnote. Pet. App. 3a n.1. The Court first noted, implicitly adopting the District Court's detailed analysis, that "standing is potentially quite fact-dependent in this case and can be adequately addressed after a final decision is entered." *Id.* The Court rejected Aurora's argument that it had pendent appellate jurisdiction over the standing issue, taking guidance from this Court's decision in *Swint v. Chambers County Commission*, 514 U.S. 35, 50-51 (1995). *Id.* On the merits of Aurora's immunity appeal, the Court affirmed the District Court's decision that the litigation privilege did not immunize defendants from liability for their falsehoods. Pet. App. 4a.

The Ninth Circuit's memorandum was not published. *See* Pet. App. 2a n.*. Pursuant to a Ninth Circuit local rule, such an unpublished memorandum is "not binding precedent" and "may not be cited to or by the courts" within the Ninth Circuit. *See* Ninth Circuit Rule 36-3(a)-(b).[6]

6. Exceptions in the rule permit citation to an unpublished disposition in very limited circumstances: (1) when relevant for purposes of the doctrines of law of the case, res judicata or collateral estoppel, (2) to "show double jeopardy, sanctionable conduct, notice, (Cont'd)

Aurora then filed a Petition for Rehearing in the Ninth Circuit, arguing the procedural issue it raises in its Petition for Writ of Certiorari. The Court denied the Petition for Rehearing without opinion. Pet. App. 58a-59a.

Finally, Aurora again chose not to pursue the issue of standing in the District Court with the benefit of a full factual record. Instead, Aurora filed its Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

There are no "compelling reasons" under this Court's Rule 10 to grant certiorari here.

First, review of a footnote in an unpublished memorandum to test Aurora's claim of a procedural error would serve no purpose because Sierra unquestionably has standing. Sierra is unaware of any decision of this Court, or any other, denying standing to a plaintiff in a tort action like this one. Moreover, in contrast to Aurora's cited cases, including this Court's decision in *Vermont Agency*, Aurora's challenge to Sierra's standing raises factual issues that must be resolved by a trier of fact, not by this Court in the first instance. Indeed, the District Court has already determined that Sierra's allegations are sufficient to withstand a standing challenge at the pleading stage, and that any further challenge will require resolution of issues of fact.

Second, the Petition arises from an interlocutory appeal rather than a final judgment. That alone is a sufficient reason to

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(Cont'd)
entitlement to attorneys' fees, or the existence of a related case," or (3) in a request for publication or in a petition for rehearing. Ninth Circuit Rule 36-3(b). None applies to the unpublished memorandum in this case.

deny review. Discovery is nearing completion in the District Court, and Aurora will be free to test Sierra's standing on that factual record. The Court should wait for a final judgment (if there is one) and a full factual record, by which time the issue presented in Aurora's Petition may well be rendered moot.

Third, Aurora's effort to justify review based on a conflict among the lower courts evaporates under closer examination. The unpublished decision below is of no precedential value; it is of no interest to anyone other than the parties in this litigation. It raises no broader issue that deserves this Court's attention.

Aurora's Petition for Writ of Certiorari should be denied.

I. As The District Court Held, Sierra Has Alleged Facts Sufficient To Confer Standing To Sue And Any Further Challenge To Its Standing Turns On The Resolution Of Disputed Facts.

Aurora's Petition accuses the Ninth Circuit of having rendered an advisory opinion (Pet. 19), but that would only be true if, on the merits of the issue, Sierra lacked standing to sue. But Aurora cites no case in which this Court, or any other court, has held that a party like Sierra lacks standing to bring suit. Nor has Sierra identified any such case. Sierra unquestionably has standing, making review of the procedural issue raised by Aurora an academic exercise unworthy of this Court's attention.

A striking fact about this Court's treatment of the issue of standing is that it rarely addresses it. For example, in this Court's 2001 Term, only four cases addressed the question of Article III standing. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001); *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *Utah v. Evans*, 536 U.S. 452 (2002); *Bd. of Educ. of Indep. Sch. Dist.*

No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002). Thus, in the vast majority of cases, this Court is silent on the issue of standing.

In practice, this Court appears to address standing only when it perceives a "standing *problem*." Robert L. Stern et al., *Supreme Court Practice* 812 (8th ed. 2002) (emphasis added). If there is no apparent "problem" with the plaintiff's standing then the issue is not addressed. In *Sell v. United States*, 123 S. Ct. 2174 (2003), for example, this Court granted review of an interlocutory appeal and reached the merits without ever mentioning whether or not the plaintiff had standing to sue. In a dissenting opinion joined by Justices O'Connor and Thomas, Justice Scalia wrote that "there may be no jurisdiction because, at the time this suit was filed, petitioner failed to meet the 'remediability' requirement of Article III standing. The Court of Appeals should address this jurisdictional issue on remand." *Id.* at 2188 n.3 (internal citations omitted). This Court's failure to address the issue of standing in *Sell* suggests that a Court of Appeals commits no error if it refuses to address a standing argument raised by a party if a majority of the judges hearing the case see no merit to the argument. Moreover, Justice Scalia's statement that the issue of standing should be resolved by the lower court, rather than by the Supreme Court in the first instance, confirms that the Ninth Circuit did nothing wrong in accepting the District Court's preliminary finding of standing and leaving Aurora to litigate the issue further in the District Court after remand.

The reason standing is so rarely addressed in this Court's opinions presumably stems from the fact that in most cases the plaintiff's standing is self-evident:

> The law of standing is almost exclusively concerned with such public-law questions as determinations of

> constitutionality and review of administrative or other governmental action. In theory, of course, it is not so limited. *The person suing for breach of contract or for a tort must satisfy the court that he or she is the real party in interest, but in practice such suits are brought only by a person harmed by the supposed wrong, and standing to sue is self-evident.*"

Robert L. Stern et al., *Supreme Court Practice* 810 n.2 (8th ed. 2002) (quoting C. Wright, *Law of Federal Courts* 68 (5th ed. 1994)) (emphasis added).

Thus, in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963), this Court assessed the issue of standing and stated that a private action for the business tort of interference with advantageous business relations is "*plainly justiciable.*" (emphasis added). Similarly, in *Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002), a challenge to a class action settlement, this Court rejected a challenge to plaintiff's standing in a single sentence: "As a member of the retiree class, petitioner has an interest in the settlement that creates a 'case or controversy' sufficient to satisfy the constitutional requirements of injury, causation, and redressability." (citations omitted).

Moreover, this Court routinely reaches the merits of cases involving business torts, including claims for tortious interference, without ever mentioning whether or not the plaintiff had standing under Article III. *See, e.g., Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 579 (1999) (plaintiff's claims included state law claim for tortious interference with business relations); *Haddle v. Garrison*, 525 U.S. 121, 126 (1998) (claim alleged "merely a species of the traditional torts of intentional interference with contractual relations and intentional interference with prospective

contractual relations"); *Amer. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214 (1998) (plaintiff included claim for tortious interference with contract).

Sierra's standing is likewise self-evident under the minimal requirements of Article III. A plaintiff need only allege that it "has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citations omitted).[7] Sierra has suffered "injury in fact" — defined by this Court as "an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," *Bennett*, 520 U.S. at 167 — its bid for ownership of ELIC was not selected and it suffered an injury to the business expectancy protected by California law. Sierra's injury is "fairly traceable" to defendants because Sierra's bid would have been accepted but for defendants' concealment of their knowing violations of state and federal law, illegal actions that would have precluded the Commissioner from selecting defendants' bid. Finally, the money damages sought for the intentional interference would redress Sierra's injury. Therefore, on the facts Sierra alleged, there is no question that Sierra has standing under this Court's test for Article III standing.

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7. Moreover, this Court has underscored that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Bennett*, 520 U.S. at 168 (citations omitted); *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.").

That conclusion is confirmed by the unanimity in the Courts of Appeals that a bidder in a bidding contest thwarted by the illegal actions of the winner has standing to sue. *See, e.g., Iconco v. Jensen Constr. Co.*, 622 F.2d 1291, 1301 (8th Cir. 1980) (affirming judgment for second place bidder); *Bieter Co. v. Bloomquist*, 987 F.2d 1319, 1328-29 (8th Cir. 1993) (losing bidder had standing to bring action against winning bidder who bribed awarding authority, even though plaintiff's proposal would have required further governmental approval); *Envtl. Techtonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1067 (3d Cir. 1988) (unsuccessful bidder had standing to bring claim against competitor who obtained government contract by wrongful actions); *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1343 (2d Cir. 1994) (unsuccessful bidder for a public works contract as a result of the winning bidder's kickbacks had standing to bring a RICO claim even though state law specifically provided that an unsuccessful bidder had no property interest in a public works contract).

Aurora's argument that Sierra cannot establish an "injury in fact" is based on a single decision by an intermediate California appellate court, *In Re Pacific Standard Life Ins. Co.*, 9 Cal. App. 4th 1197 (1992). *See* Pet. at 20-21. But *Pacific Standard* does not help Aurora. Indeed, it holds that claims like Sierra's are permitted.

In *Pacific Standard* an unsuccessful bidder for an asset of an insolvent insurer sought to appeal from a judgment affirming the Insurance Commissioner's decision to sell it to a rival bidder. It claimed a right of appeal under California Code of Civil Procedure § 902, as a "party aggrieved" by the Commissioner's action. *Pacific Standard*, 9 Cal. App. 4th at 1200.

The Court of Appeal rejected the attempted appeal, holding that the plaintiff was not "aggrieved" by the Commissioner's decision since it had no "cognizable interest" in that decision. *Id.* at 1203. The reason it had no "cognizable interest" in the decision, and hence was not "aggrieved," the Court explained, was that the Commissioner's decision, and the confirming order of the Conservation Court, had "*no* res judicata effect" on any claim the plaintiff might have against the winning bidder for "tortious interference with [its] purported contract" with the Commissioner. *Id.* at 1202-03 (emphasis added).

Thus, the plaintiff in *Pacific Standard* was denied standing to appeal the Commissioner's decision precisely because that decision did *not* impair its ability to sue the winning bidder for tortious interference, as Sierra has done.

The Court of Appeal further explained that the issue before the Rehabilitation Court was simply the "prescription of terms for and authorization of the sale," and therefore its ruling approving the sale "*had no bearing*" on "the validity of [plaintiff's] claim [that defendant] . . . tortiously interfered with its purported contract . . . ." *Id.* at 1203 (emphasis added). It was for that reason that plaintiff was not "aggrieved" by that ruling and had no right of appeal.

Pacific Standard thus establishes the exact opposite of the proposition for which Aurora cites it.

Sierra is not appealing the Commissioner's decision to award ELIC to defendants and, under *Pacific Standard*, could not have done so. Rather, it is suing defendants for tortiously interfering with its reasonable expectation that, but for their wrongdoing, it would have been awarded the bid — the very claim that *Pacific Standard* found unaffected by the Commissioner's decision or the rulings of the Rehabilitation Court.

Indeed, at oral argument in the Ninth Circuit, counsel for the Commissioner argued this point on Sierra's behalf. He stated:

> I must say to you, because the Commissioner was a party in the *Pacific Standard Life* case, that it has been badly mischaracterized in the briefs filed by the defendants-appellants. It is not a case which stands for any proposition other than that a disappointed bidder does not have standing to appeal the award of the bid . . . And, in fact, on the facts of the case, there was a companion case that's referred to in the opinion itself twice, which was a tortious interference case. And the court in *In Re Pacific Standard Life* said, our holding on standing to appeal has nothing to do with the disappointed bidder, although albeit in a slightly different context, the same person, suing for tortious interference.

Finally, shortly after oral argument in the Ninth Circuit, the California Supreme Court decided *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003), which confirmed that a party in Sierra's position has standing to bring a claim for intentional interference under California law, the law applicable to Sierra's claim. The plaintiff in *Korea Supply* was a broker who sued to recover the commission it alleged it would have earned from its principal, an unsuccessful bidder, who lost the contract due to illegal behavior by the winning bidder. *Id.* at 1140. Sierra's standing to bring a claim under the same tort theory is an *a fortiori* case; Sierra was itself the runner-up winner in the bidding, rather than a broker suing to recover money it would have obtained from its principal had the principal prevailed in the bidding for a government contract.

Sierra's standing to sue is easily confirmed by those authorities. Recognizing this, Aurora has consistently sought to contest Sierra's allegations by relying on material obtained through discovery and not appearing in Sierra's Complaint. The District Court refused to consider this material because Aurora was moving to dismiss Sierra's Complaint rather than for summary judgment. Pet. App. 41a. The District Court explained that Aurora's challenge to Sierra's standing, based as it was on evidence outside the Complaint, was premature because "too many facts and inferences are disputed. The issues require full briefings, such as on motions for summary judgment." *Id.*

Aurora continued that effort in its interlocutory appeal, submitting hundreds of pages of evidence to the Court of Appeal. C.A. App. 32-52, 88-127, 301-472, 621-71; Supp. CA. App. 1-161. It was thus not surprising that the Ninth Circuit declined to address the merits of Aurora's argument and instead noted that its argument is "potentially quite fact-dependent." Pet. App. 3a n.1.

Sierra has standing. To grant review on the procedural question raised in Aurora's Petition would serve no purpose on the merits, because this Court (or the Ninth Circuit, if compelled to reach the merits) would quickly find, as did the District Court, that Sierra has adequately alleged standing. Any further challenge to Sierra's standing would turn on disputed facts that can be resolved only by a trier of fact, not by this Court or the Ninth Circuit.

II. This Case Is Not Ripe For Review.

Where a Court of Appeals remands a case for further proceedings, "it is not yet ripe for review by this Court." *Bhd. of Locomotive Firemen and Enginemen, et al. v. Bangor & Aroostook R.R. Co., et al.*, 389 U.S. 327, 328 (1967) (denying petition for writ of certiorari where court of appeals ruled on various legal issues and remanded case to district court for further consideration). The reason for this rule is that "many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *Amer. Constr. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893) ("This court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."). Instead, this Court "generally await[s] final judgment in the lower courts before exercising our certiorari jurisdiction." *Va. Military Inst., et al., v. United States*, 508 U.S. 946 (1993) (denying petition for writ of certiorari) (Scalia, J., concurring).[8]

Aurora's Petition is premature and should be denied. The Ninth Circuit's decision on Aurora's interlocutory appeal remanded the case to the District Court for further proceedings. Discovery has continued in the District Court throughout the pendency of Aurora's interlocutory appeal to the present day. Aurora has been and remains free to move for summary judgment to challenge Sierra's standing or to raise the issue at trial. Sierra's standing can thus be tested on a full record in the District Court, with complete appellate review of any final judgment.

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8. This Court ultimately granted review in this case following entry of final judgment in the lower courts. *See United States v. Virginia*, 518 U.S. 515 (1996).

Aurora contends that the Ninth Circuit's decision will forever evade review unless this Court grants review now. Pet. App. 22. Aurora is wrong. If this case proceeds to a final judgment (and, unlike most civil cases, is not settled or otherwise resolved before judgment), then Aurora can challenge Sierra's standing in an appeal from the final judgment. In that hypothetical future appeal Aurora could present all of its standing arguments to the Ninth Circuit based on a full factual record.

If the Ninth Circuit addresses the merits of Aurora's standing arguments, then the procedural question — the only question raised in Aurora's Petition — will be moot. On the other hand, in the highly unlikely event that the Ninth Circuit refused to consider the merits of Aurora's standing arguments, Aurora's procedural issue would then be ripe for certiorari review on a full record.

Waiting for a final judgment for appellate review of the District Court's holding that Sierra has standing to sue is wholly consistent with the general rule that interlocutory review is never available to a party who unsuccessfully challenges a plaintiff's standing. *See Catlin v. United States*, 324 U.S. 229, 236 (1945) ("[D]enial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable."). This Court has no reason to review this case now and every reason to wait for a final judgment.

III. The Unpublished Decision Below Creates No Conflict, Much Less One Sufficient To Justify Review.

Aurora argues that a statement in a footnote in the Ninth Circuit's unpublished memorandum contravenes this Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). Pet. 7-11. In *Vermont Agency*, this Court addressed the issue of whether

the plaintiff, a private person suing in the name of the United States as a *qui tam* relator, had standing to bring a claim under the Federal False Claims Act. This Court held that the plaintiff there had standing, a matter it was able to resolve as a matter of law without having to resolve any issues of fact. *Id.* at 768-78. This Court apparently raised the issue because it perceived a significant question of law as to the plaintiff's standing. As the Ninth Circuit explained, *Vermont Agency* did not hold that a Court of Appeals must address the merits of the plaintiff's standing in every interlocutory appeal. Pet. App. 3a n.1. Indeed, as discussed above, this Court rarely addresses standing, and has even declined to address it where three dissenting Justices contend that a plaintiff lacks standing. *See* p. 10, above.

Even if the footnote in the Ninth Circuit's unpublished memorandum disposition were somehow inconsistent with *Vermont Agency*, however, this Court does not sit simply to correct errors by lower courts. *See Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) ("The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."); Robert L. Stern et al., *Supreme Court Practice* 255 (8th ed. 2002) ("[T]he Court generally will not grant certiorari just because the decision below may be erroneous.").

Aurora's second argument is that the unpublished memorandum conflicts with published opinions of the Second and Tenth Circuits: *Merritt v. Shuttle, Inc.*, 187 F.3d 263, 269 (2d Cir. 1999) and *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1201 (10th Cir. 2002). However, the unpublished

memorandum, under the Ninth Circuit's rules, is "not binding precedent" and "may not be cited to or by the courts" within the Ninth Circuit. *See* Ninth Circuit Rule 36-3(a)-(b). Given that the memorandum is of no precedential value within the Ninth Circuit, any perceived conflict with *Merritt* or *Timpanogos Tribe* is wholly theoretical. The memorandum is of no interest to anyone other than Aurora and Sierra.[9]

Nor does the unpublished memorandum suggest a risk of "unchecked issuance of advisory opinions by the Ninth Circuit." Pet. 19. The Ninth Circuit's recent *published* cases confirm that it addresses issues of Article III jurisdiction when appropriate. *Meredith v. Oregon*, 321 F.3d 807, 816 (9th Cir. 2003) ("Resolution of [the Court's Article III] subject matter jurisdiction" was necessary "because if appellate courts lack jurisdiction, they cannot review the merits of these properly appealed rulings."); *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 2003 WL 22025130, __ F.3d __ n.12 (9th Cir. Aug. 29, 2003) (en banc) (stating that in "cases in which jurisdictional questions may exist, we are required to resolve those questions first," and citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) for proposition that it "requir[es] that a court first address its own jurisdiction before deciding a case on the merits.").[10]

9. Aurora claims that this Court "routinely" grants review of unpublished decisions (Pet. 22), but its citation to three cases from 2001 and one case from 2000 proves that it is the rare exception rather than the rule.

10. Aurora's claimed "conflict" is a fiction given that *Meredith* is consistent with Aurora's interpretation of *Vermont Agency*, as well as *Merritt* and *Timpanogos Tribe*. As a *published* opinion, future litigants in the Ninth Circuit and elsewhere can cite *Meredith* as authority. *Meredith* itself cites *Merritt* and *Timpanogos Tribe* with

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Aurora also attempts to demonstrate the existence of a conflict by citing a pair of Eleventh Circuit cases — *Moniz v. City of Fort Lauderdale*, 145 F.3d 1278, 1281 n.3 (11th Cir. 1998) and *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1334-36 (11th Cir. 1999) — both of which declined to address a standing argument in the context of an interlocutory appeal. Pet. 11 & 13-14. Both cases were decided before *Vermont Agency*, *Merritt* and *Timpanogos Tribe*, and the most recent of the cases — which is itself four years old — simply followed *Moniz*. The Eleventh Circuit might well reach a different result if it were to face the question in the future. There is no current conflict that is ripe for review.

Finally, Aurora argues that the "conflict is deeper" because courts have held in the context of other forms of interlocutory appeals that Article III jurisdiction issues must always be addressed at the threshold. Pet. 8 & 16-18. Aurora has it backwards: those cases reveal *unanimity* in the Courts of Appeals, not any conflict that requires this Court's attention.

* * * * *

There is no need for this Court to review a footnote in an unpublished decision addressing an issue which, as a pleading matter, reflected no error and which remains open for a decision on a full factual record either by motion or at trial. Nor is there any conflict in the lower courts that would justify review.

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approval. *Meredith*, 321 F.3d at 813, 816. Furthermore, *Meredith* is binding on all future panels of the Ninth Circuit. *Hart v. Massanari*, 266 F.3d 1155, 1171-72 (9th Cir. 2001). The unpublished memorandum below, by contrast, cannot be cited by or to any court in the Ninth Circuit and thus is not a precedent on which any future litigant or court can rely.

CONCLUSION

Sierra respectfully requests that the Court deny Aurora's Petition for Writ of Certiorari.

Respectfully submitted,

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